Case No. 33863

IN THE SUPREME COURT OF APPEALS
WEST VIRGINIA

MATTHEW BRIAN YOAK, M.D.

Appellant,

v.

MARSHALL UNIVERSITY BOARD OF GOVERNORS, UNIVERSITY PHYSICIANS AND SURGEONS, INC., and DAVID A. DURNING, M.D., Individually,

Appellees.

REPLY BRIEF OF APPELLANT

From the May 23, 2007
Decision and Order of
The Honorable David M. Pancake,
Circuit Judge, Sixth Judicial Circuit
CA No. 06-C-0957

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I. Argument

A. MUBG Is Fairly Charged With Knowledge of Matthew B. Yoak's Cause of Action for Violation of the Right of Publicity, Where The Right Was Memorialized in Two Separate Syllabus Points of *Crump* in 1984, More Than Twenty Years Before The November 2004 Actions Complained of Here.

In their Brief to this Court, Defendants MUBG and UP&S do not contest the factual assertion that they misappropriated his identity by publishing on their own commercial web-page, Matthew B. Yoak's name and credentials, which clearly had commercial value, and which Dr. Yoak has spent many years of work and effort building, and many, many thousands of educational dollars acquiring, without his consent -- from the date of his dismissal on December 3, 2004 at least through May 7, 2005 -- nearly six months after Dr. Yoak departed employment their employment.

Nor do Defendants contest the principle that Dr. Yoak is entitled to compensation for the fair market value of that misappropriation under the doctrine of *quantum meruit* because of Appellants' unjust enrichment.

Instead, Defendants argue that the right of publicity in this Court's opinion in *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1984), more than twenty years before the acts complained of, was not sufficiently well developed to make Defendants aware of the right and, thereby, to impose a duty on these Defendants to honor his rights. Defendants amplify those portions of *Curran v Amazon, Inc.*, (S.D.W.Va. February 19, 2008), which acknowledge that the right was not further developed, at least in reported decisions of the West Virginia Supreme Court of Appeals, in the 22 years following its 1984 publication.

However, the language of *Crump* does not admit of ambiguity and was elevated to the status of a Syllabus Point 8, which provided:

> 8. An "invasion of privacy" includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public.

173 W. Va. 699; 320 S.E.2d 70 (emphasis added).

Further, Syllabus point 11 of *Crump* explained the elements of a claim of appropriation:

> 11. In order for a communication to constitute an appropriation, mere publication of a person's name or likeness is not enough, the defendant must take for his own use or benefit the reputation, prestige or commercial standing, public interest or other value associated with the name or likeness published.

Id.(emphasis added).

This Court has clearly held that the statement of a principle of law in a syllabus point establishes the principle as binding precedent in this jurisdiction. See *Teter v. Teter*, 163 W. Va. 770, 773 (W. Va. 1979). Accordingly, regardless of its status as "fully developed" or merely "nascent" in this jurisdiction, the elevation of misappropriation of identity to the status of two separate syllabus points establishes the concept as controlling precedent in this jurisdiction. Respondents, assuredly, are not entitled to unilaterally pick and choose the syllabus points they may be charged with knowledge of, and those which they may ignore with impunity.

One might fairly ask: "How long does a matter have to be established, and how clearly stated, to satisfy the notice requirement?" The answer to the question need not be answered in the abstract in this instance because the facts in this case make clear, as discussed in the following section, that these defendants will *never* acknowledge having received adequate notice of the law, even when it is recited in the very contract they are alleged to have breached.

B. MUGB and Dr. Denning Have Abandoned Their Claim To Be To Entitled To Qualified Immunity -- On the Theory That Plaintiff Had Not Alleged Violation Of Any "Clearly Established Rights" – Because They Cannot Expect This Court To Ignore The Fact That The Parties' Contract Expressly Incorporated The Employee Rights Of Notice And An Opportunity To Be Heard, Recited In Title 133, Series 9, CSR.

In Paragraph 15 of his Complaint, Dr. Yoak explicitly alleged that Title 133, Series 9, entitled "Academic Freedom, Professional Responsibility, Promotion and Tenure," governed the contract entered into by MUBG and Dr. Yoak. In Paragraph 16 of his Complaint, Dr. Yoak recited verbatim the provisions of CSR § 133-9-12 which provide in 12.1 a comprehensive list of causes for dismissal (none of which include resignation prior to termination of a contract term), and which require in 12.2 written notice, by certified mail, return receipt requested, of a full statement of the charges, the procedure, and an opportunity to meet and refute charges.

Paragraph 17 of Dr. Yoak's Complaint provides as follows:

> 17. On November 19, 2004, in derogation of the custom and practice uniformly applied in prior faculty resignations, and in violation of state regulations and the parties' contract, Defendant David A. Denning unlawfully rejected Plaintiff's resignation and, without cause, notice or compliance with applicable procedures, dismissed Plaintiff from employment by MUBG and UP&S effective December 3, 2004, causing Dr. Yoak to lose wages in an amount to be proved at trial.

Complaint, Par 17 (emphasis added)

Exhibit A to Dr. Yoak's Response to the Rule 12 (b)(6) Motion to Dismiss in this case consists of Title 133, Series 9, entitled "Academic Freedom, Professional Responsibility, Promotion and Tenure," and recites in detail the myriad rights guaranteed to Dr. Yoak and are expressly incorporated into the parties contract signed by Dr. Denning.

Exhibit B to Dr. Yoak's Response to the Rule 12 (b)(6) Motion to Dismiss was the contract between defendants and plaintiff, and at page 2, paragraph D, provides in pertinent part that:

> This offer of appointment and all of the terms and conditions contained herein are subject to the provisions of West Virginia Higher Education Policy Commission Title 133, Procedural Rue Series 9 which is incorporated by reference.

Exhibit B, page 2, par. D (emphasis added).

Dr. Denning signed this contract personally and cannot plausibly deny knowledge of the existence of rights of employees which have already worked there way into the boiler plate of every faculty employee contract he signs.

In their brief to this Court, MUBG and Denning silently drop the "notice" argument for the procedural cause of action for violation of CSR Title 133, Procedural Rue Series [9] (preferring to reserve it for use only with regard to the equally specious claim that *Crump* provided inadequate notice), and instead argue that Matthew Yoak waived any claim under CSR Title 133, Procedural Rue Series 9 by breaching his contract by a mid-year resignation.[1]

[1] MUBG and Denning reserve their "notice" argument for Dr. Yoak's argument that the Circuit Court erred in dismissing Dr. Yoak's claim for MUBG's negligently publishing inaccurate advertisements claiming that Dr. Yoak was board certified in plastic surgery – at a time when he was not -- which caused the accrediting board to delay Dr. Yoak's accreditation for one year, thereby subjecting him to continuing personal and professional embarrassment. Simple negligence has been a ground for liability, and state defendants have been charged with knowledge of that ground for liability, at least since the 20-year old statutory creation of BRIM reflected in W. Va. Code § 29-12-1 et seq. which acknowledged liability for all matters covered by insurance including simple negligence.

C. Respondents Now Defend The Dismissal of Dr. Yoak Solely on Breach of Contract -- But Ignore the Fact That the Exclusive List of Grounds for Dismissal Excludes Mid-Year Resignation

Having abandoned the "notice" theory and shifted their argument to a theory of breach, neither MUBG nor Denning even once address Yoak's argument, based upon the fact that the language of Title 133, CSR, § 133-9-12[2] – which states the exclusive grounds for dismissal – conspicuously omit early resignation as a ground. Nor do MUBG or Denning once address the corollary argument that early resignation is dealt with in a separate section, 133-9-8, entitled "Faculty Resignations." As noted previously, that section provides in its entirety as follows:

> A faculty member desiring to terminate an existing appointment during or at the end of the academic year, or to decline re-appointment, shall give notice in writing at the earliest opportunity. Professional ethics dictate due consideration of the institution's need to have a full complement of faculty throughout the academic year.

Title 133, CSR, § 133-9-8.

If MUBG and Denning wish to rely upon the "breach of contract" theory to establish a grounds for electing to terminate the contract with Dr. Yoak, they cannot simultaneously ignore their own regulations that plainly limit the grounds for dismissal to matters other than mid-year resignation, and tacitly acknowledge in § 133-9-8, the custom and practice Dr. Yoak asserted.

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[2] Title 133, CSR, § 9-12.1. Causes for Dismissal: The dismissal of a faculty member shall be effected only pursuant to the procedures provided in these policies and only for one or more of the following causes:

12.1.1. Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct;

12.1.2. Conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related, or other discriminatory practices;

12.1.3. Insubordination by refusal to abide by legitimate reasonable directions of administrators;

12.1.4. Physical or mental disability for which no reasonable accommodation can be made, and which makes the faculty member unable, within a reasonable degree of medical certainty and by reasonably determined medical opinion, to perform assigned duties;

12.1.5. Substantial and manifest neglect of duty; and

12.1.6. Failure to return at the end of a leave of absence.

But at least MUBG and Denning have abandoned the notice argument as it relates to the applicability of Title 133 CSR, Series 9. Their argument against that contractually adopted set of regulations rests on a different, albeit equally insufficient, theory discussed below.

D. MUBG and Denning Ignore The Explicit Provisions of The Parties' Contract That Overrode the Purported Requirements of A So-Called "Green Book" And Assert The Purported Exhaustion Requirement of W. Va. Code § 29-6A-1 et seq Which Explicitly Exempted From Its Requirements "Employees Of The Board Of Regents And State Institutions Of Higher Education"

The July 1, 2005 to June 30, 2005 contract signed by Dr. Yoak and Dr. Denning, on behalf of MUBG and UP&S expressly incorporated procedures to deal with termination as provided in Title 133, Series 9, CSR. As noted above, those procedures provide for notice, an opportunity to be heard. The contract further explicitly provided that any conflict between Title 133 and the "Green Book" would be resolved in favor of the provisions of Title 133:

> In the event any inconsistencies exist between this notice of appointment, the "Greenbook" and West Virginia Higher Education Policy Commission Title 133, Procedural Rule Series 9, the provisions of the West Virginia Higher Education Policy Commission Title 133, Procedural Rule Series 9 take precedence over those contained herein or elsewhere.

Exhibit B to Plaintiff's February 13, 2007 Opposition to Motion to Dismiss (emphasis added).

Title 133 includes no exhaustion requirement. Thus, to the extent that the "Green Book" includes any exhaustion requirement, it is by virtue of its inconsistency, expressly written out of the parties' contract.

In their Brief to this Court, MUBG and Denning now argue that 133 CSR 9-15 adopts the alleged grievance procedures set forth in W. Va. Code § 29-6A-1 et seq. and thereby prevail in

the "exhaustion" argument *vis a vis* Yoak's contention that Title 133 contained no grieveance procedure.

Unfortunately, as MUGB and Denning both well know, W. Va. Code § 29-6A-1, et seq., in effect at the time of Dr. Yoak's resignation, expressly exempted from its requirements for grievance procedures "employees of the board of regents and state institutions of higher education." Respondents MUGB and Denning only came up with the "Green Book" argument below after their initial argument, based exclusively upon § 29-6A-1 et seq., collided head on with the express exemption recited here.

Having now discovered the holes in the "Green Book" argument, based upon the conflict with Title 133 -- which their contract explicitly provides will prevail in the event of any conflict -- Respondents have now fallen back on the previously discredited statutory argument.

So what is their answer to the exemption of "employees of the board of regents and state institutions of higher education" now? Thinking people want to know.

E. Rule 12 (b)(6) Bars The Argument That UP&S Is Not An Arm of the State

The Claim That UP&S is an arm of the state is directly contradicted by the facts alleged in the Complaint which have never been contested by an affidavit or other effective denial, and are assumed true for purposes of Rule 12 (b)(6). Recognizing the feebleness of their "arm" of the state argument, UP&S now argues for the first time that, because their employment contract with Dr. Yoak was predicated on continued employment with MUBG, UP&S's contract evaporated with the termination of MUBG's contract. Even accepting this domino theory of contract liability, one must note that it depends for its viability on the MUBG summary dismissal sticking.

UP&S cannot revive their sovereign immunity argument by coupling it to an equally flawed argument that MUBG's was entitled to ignore the controlling provisions of 133 CSR Part 9.

F. Conclusion

MUBG, UP&S and Denning offer no reasoning adequate to sustain the Circuit Court's dismissal of Dr. Yoak's Complaint against them for summary dismissal and the independent torts recited therein. Reversal is required.

Respectfully submitted,

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II. Certificate of Service

I hereby certify that a copy of the REPLY BRIEF OF APPELLANT was mailed, postage prepaid, to counsel of record at the addresses indicated below, on this 30th day of April, 2008:

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